Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

CALIFORNIANS AGAINST CORRUPTION, CARL RUSSELL HOWARD AND STEPHEN J. CICERO,
Petitioners,

v.

FAIR POLITICAL PRACTICES COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the California Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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Petitioners

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QUESTIONS PRESENTED

1. Whether the court below erred in affirming imposition of a $1.1 million election law civil penalty against a defunct nonprofit organization and two of its unemployed officers, while refusing to consider their Eighth and Fourteenth Amendment rights against imposition of cruel and unusual punishments and excessive fines, and requiring pursuit of a mode of review in which assessment of the penalty was subject to a strong presumption of validity.

2. Whether the court below erred in summarily affirming imposition of that penalty for failure to disclose contributors, after the organization and its officers raised triable issues of fact relating to First Amendment defenses under *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), *Bates v. Little Rock*, 361 U.S. 516 (1960), and *NAACP v. Alabama*, 357 U.S. 449 (1958).

3. Whether the court below erred by allowing a state agency serving as law enforcement officer, prosecutor, judge, and jury to impose in absentia, as punishment for expression of opinions and for political acts not involving *mens rea*, a "civil" penalty so disproportionately large it constituted a sentence of lifetime impoverishment and disenfranchisement suitable only to a criminal act, upon two unemployed dissidents too destitute to pay even the interest on it, without permitting the most basic rights accorded a defendant facing the possibility of even one day in jail (jury trial, presumption of innocence, attorney, attorney provided if defendants cannot afford one, right to adequate counsel), or a defendant facing even a $100 fine (judicial trial, presumption of innocence), creating case defects that exist solely due to their denial of these rights, and then relying on those the very defects in such a way as to deny other established, incorporated federal constitutional rights without judicial trial of any kind.

PARTIES TO THE PROCEEDING

See case caption. Petitioner Californians Against Corruption is an unincorporated association with no parent or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners request that a writ of certiorari issue to review the final order of the California Supreme Court.

OPINIONS BELOW

The opinion of the California Court of Appeals is reported as *Fair Political Practices Commission v. Californians Against Corruption*, 109 Cal.App.4th 269, 134 Cal.Rptr.2d 659 (2003) and reproduced in the Appendix ("App.") at 1a. The California Supreme Court order denying Petitioners' petition for review is unpublished and reproduced in the Appendix at App. 19a. The Sacramento County Superior Court opinions granting summary judgment to Respondents and dismissing Petitioners' counterclaim are unreported and are reproduced in the Appendix at App. 23a.

JURISDICTION

On April 29, 2003, the California Court of Appeals affirmed judgment of the Superior Court of Sacramento County, upholding in full the penalty against Petitioners. On September 10, 2003, the California Supreme Court denied review. On December 3, 2003, Justice O'Connor granted application 03A475, extending time to file Petition for Writ of Certiorari until January 10, 2004. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Government Code section 91013.5 (Stats. 1984, ch. 670, § 5, since amended) stated:

> "In addition to any other available remedies, the commission or the filing officer may bring a civil action and obtain a judgment in small claims, municipal, or superior court, depending on the jurisdictional amount, for the purpose of collecting any unpaid monetary penalties, fees, or civil penalties imposed pursuant to this title. The venue for this action shall be in the county where the monetary penalties, fees, or civil penalties were imposed by the commission or the filing officer. In order to obtain a judgment in a proceeding under this section, the commission or filing officer shall show, following the procedures and rules of evidence as applied in ordinary civil actions, all of the following:
>
> "(a) That the monetary penalties, fees, or civil penalties were imposed following the procedures set forth in this title and implementing regulations.
>
> "(b) That the defendant or defendants in the action were notified, by actual or constructive notice, of the imposition of the monetary penalties, fees, or civil penalties.

"(c) That a demand for payment has been made by the commission or the filing officer and full payment has not been received."

STATEMENT OF THE CASE

Petitioner Californians Against Corruption ("CAC") was formed in 1989 as an unincorporated association and later as a political action committee registered with the Fair Political Practices Commission ("FPPC" or "Commission"), which regulates political activity. CAC's goal was to oust Senate President David Roberti, Assembly Speaker Pro Tem Mike Roos, Assemblyman Lloyd Connelly, and certain other incumbents, based on evidence of corruption and dishonor of the oath to uphold the U.S. Constitution. CAC opposed Roos in a 1990 election, then notified Roos and his constituents that it was preparing to recall him. Roos resigned in 1991, just 10 weeks after his 1990 election, heading off the recall. CAC opposed Roberti in two 1992 special elections and filed campaign finance reports for them. In 1994, CAC qualified a landmark recall against Roberti that gained extensive national news coverage as California's first legislative recall since 1914. Roberti survived the recall, but his career in elective politics was ruined, and he blamed CAC's recall.

CAC was a true grassroots effort with a diverse, all-volunteer staff of political neophytes, including some constituents of Roos and Roberti. In its 7-year history it raised just $141,000, a tiny sum by conventional political standards. The vast bulk of donations were far less than $100 each. CAC could not afford professional campaign finance or legal representation. Nor could CAC afford direct mail to voters. Voters instead received CAC's mail indirectly via volunteers in all 50 states, many living within the district. Each volunteer told CAC how many letters he or she could afford to mail. CAC then mailed the requested number of voter addresses, along with a master letter, to each volunteer, who at his or her own expense photocopied, folded, stuffed, hand addressed,

stamped, and mailed CAC's letter to the voters. CAC's unique grassroots "remail" method was covered in the national media (e.g., Wall Street Journal, 5-26-92). Highly effective on a shoestring budget, CAC was increasingly seen as a threat to incumbents.

In 1990, instigated by CAC's opponents, the FPPC threatened CAC with prosecution unless it reported remails as in-kind donations, when it knew CAC had no means to determine how many remails were actually completed, or the materials and time-value of each of hundreds of individual volunteers. The FPPC backed off that demand, while reserving the right to reinstate it. From that point on, CAC's opponents instigated nearly constant FPPC harassment.

As a 26-year incumbent, 13 as Senate President, Roberti wielded considerable power, both official and otherwise, and had a zealous partisan following and media support. CAC's organizers received death threats, App. 24, its headquarters was burglarized, its telephone lines cut. *Id.*

California statutes required CAC to file statements reporting campaign donor identities. Petitioner Howard had filed reports for earlier campaigns, though due to limited resources, he filed somewhat late as is common even with professional campaigns, receiving nominal late fines of $10 per day, partially waived, as is also common. During the recall, Howard's resources were stretched to the limit as fundraiser, spokesman, and executive director in addition to acting treasurer. Statements ran late, and Roberti instigated intense media pressure on CAC to report. Howard told the media that he would submit the reports as soon as possible, despite his *opinion* that certain aspects of mandatory disclosure were unconstitutional as they were being applied to CAC. Howard was misquoted by a reporter to sound contemptuous of the FPPC. That sensationalized misrepresentation of dissident political opinion was later explicitly

cited by the FPPC as justification for levying against both Howard and Cicero the largest disclosure fine ever issued by any state. (App 4)

At the outset of the recall petition drive, an umbrella group called the Coalition to Restore Government Integrity ("CRGI") had been formed that included nationally known victims rights, tax limitation, law enforcement, and good government groups. When CRGI reported donor identities, Roberti and the media began to announce their names and addresses in print and over the air, smearing them as extremists, App. 25, and even Aryan supremacists. In fact, the recall was led by a diverse coalition of all races, religions, creeds, and parties. The sponsors listed on the recall petition were 5 former challengers for Roberti's seat from 5 parties (Democrat, Republican, Libertarian, Green, Peace & Freedom). The scurrilous demonization, with few exceptions aided by the media, was so intense that Howard, the Recall's Executive Director, was forced to continually combat it, even to the point of publicly announcing that his Great Grandfather was a Rabbi. In light of this atmosphere, CAC supporters called CAC to report fears of reprisal and discrimination due to their association with CAC's demonized campaign. This caused a chilling effect on CAC's donors' and members' ability to participate in the political process. *Id.* To shield donors from harm in the exercise of 1st Amendment rights, Howard, as acting treasurer, thereafter reluctantly, temporarily and partially declined to itemize donors' full identities. Trying to balance the spirit of disclosure law against donors' right to participate in the political process and their need for anonymity in an atmosphere of demonization and harassment, Howard continued good faith disclosure of each donation, together with a partial address (city & state) and either a partial (or more often full) donor name. He never stopped providing itemized expenditures and other required figures. After the election, he disclosed all remaining information to the best of his ability.

The FPPC enforces California electoral statutes and regulates many key aspects of free speech. In 1994, shortly after the recall, the FPPC audited CAC. Howard, then unemployed and deemed disabled by the state for major depression, cooperated fully, to provide every piece of information requested. At the audit, Howard told the FPPC that CAC had submitted a change of treasurer form but was never able to execute that change within the group; that thus Howard had remained de facto treasurer and Petitioner Cicero had not done any of the acts in question other than signing forms that Howard had completed. Howard told the FPPC about his campaign-related job loss and incapacitation; the death threats, break-ins, and donor complaints; the chilling effect on volunteer and donor involvement; and his concern over harassment and discrimination against donors as his reason for temporarily and partially shielding identities and addresses, while acting in good faith to comply despite his political opinions that he had acted constitutionally and that the primary unintended consequence of mandatory disclosure was incumbent protection, by enabling powerful politicians to identify and oppress those who would donate to their opponents. After cooperating with the audit and delivering all of CAC's available records, Howard wrote the FPPC apologizing for any delay, explaining the benign reasons for omissions, and offering continued cooperation.

In 1995, the FPPC commenced civil penalty proceedings against CAC, Howard and Cicero, who were *both* charged as its treasurers with the same 404 counts. 352 of these were multiple counts of the same approximately 100 donations: One count for failure to disclose a donor's full name, one for the same donor's full address, one for the same donor's occupation, one for employer, and one for donation amount; this despite the fact that partial and usually full names, accurate donation amounts, and city and state had been reported in nearly all cases. Moreover, the FPPC knew that CAC had in nearly all cases *not* intentionally withheld

occupation and employer; that CAC had always requested that information from its donors, but was *unable* to provide it to the FPPC because donors had rarely provided it to CAC; that CAC could not force donors to provide it.

The FPPC held a probable cause hearing in Sacramento. Being unemployed and/or disabled, and living in Southern California, Petitioners (hereinafter, "we" or "us") were unable to travel to Northern California. Nor were we ever properly served, notwithstanding subsequent discovery of fabricated service documents. Howard had told the FPPC that he could not afford counsel. Cicero had written the FPPC that Cicero did "not have the means to retain legal counsel". We could not afford a lawyer to defend against an agency that was preparing to violate our 8th Amendment and other Constitutional rights by imposing what in essence was a sentence of lifetime impoverishment. For all of these reasons, we could not and did not appear before the FPPC. We did not waive our 8th Amendment rights, nor did our inability to appear waive the FPPC of its obligation to obey the US Constitution.

Although FPPC's statutes require hearings be held before the FPPC or its Executive Director,[1] they were run by its senior (*i.e.*, enforcement) staff.

When assessing penalties, FPPC statutes require it to credit good faith efforts to comply and cooperate. The FPPC knew

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[1] The Commission itself is charged with holding the probable cause hearings. Calif. Gov. Code § 83116. The Commission has by regulation delegated this power to the Executive Director. Calif. Code Regs., title 2, § 18361(d)(4). In this case the chairman, acting alone, improperly purported to delegate the power to hold hearings to one Jeevan Ahuja, Senior Commission Counsel, who made the probable cause finding. The chairman later purported to delegate to two other employees the power to act as the Executive Director. One of these then assessed the penalty against Petitioners. The Commission subsequently voted to adopt the decision thus arrived at, upholding improper delegation of power in such a way as to impose clear 8th Amendment violation. Moreover, the Commission itself was improperly constituted, due to over-30-day vacancies violating its balance of power clauses.

Howard had acted without *malum in se* and that Cicero had not acted. The FPPC knew Howard alone had acted to shield donors from harassment and preserve their 1st Amendment rights. The FPPC knew that even while partially withholding identities, Howard continued in good faith disclosing accurate donation and other figures. The FPPC knew CAC's later full disclosure had effectively turned the earlier partial non-disclosure into late form filings, which would have carried a maximum fine of only a few thousand dollars in total. Though Petitioners were unaware of US Supreme Court decisions sanctioning anonymity under such conditions, the FPPC surely knew of them. The FPPC knew that Howard was disabled; that we were both unemployed, virtually destitute, and unable to hire a lawyer.

Despite knowledge of mitigating evidence, lack of harm done, good faith initial disclosure to the extent consistent with donor protection, later full disclosure and full cooperation prior to the hearing, our financial and physical condition, and the unconscionable disproportionality, cruelty and uniqueness of the punishment compared to much smaller FPPC fines levied for far graver violations involving millions of dollars and *malum in se* by extremely wealthy political professionals and business interests, the FPPC staff denied the existence of any good faith, cooperation, or mitigating factors. All mitigating evidence such as our unemployment, Howard's incapacitation, ultimate full disclosure and extensive audit cooperation were withheld from the Commission. Violating their duty to obey the US Constitution, the FPPC assessed the maximum $2,000 penalty for each alleged violation, a total of $808,000, in joint and several liability. The Commission voted to affirm the penalty, five times the total funds CAC raised in its entire 7-year history, and Roberti attended the proceedings. It is still the largest disclosure fine ever issued by any state, and was by far the largest penalty assessed in the FPPC's history, exceeding the total of all FPPC fines in its first 15 years of existence, far exceeding

FPPC fines against multimillionaire politicians and corporations for money laundering and other frauds in the millions of dollars. E.g., www.opensecrets.org/regulation/penalties/agency.htm. So far as Petitioners can ascertain, it marks the only time the FPPC has itemized each possible aspect of a violation and imposed the maximum penalty on each. *Compare Los Angeles Taxpayers Alliance v. Fair Political Practices Commission*, 14 Cal. App. 4th 1214, 18 Cal. Rptr. 2d 472 (1993) ($6,000 penalty for three improper mass mailings; size of mailings unstated except for the statutory definition, *viz.*, more than 200 letters mailed.)

Howard had provided accurate donation amounts in nearly all cases, but the FPPC fined us as if these amounts had not been provided.

35 counts ($70,000 in fines) were for inadvertently failing to itemize street addresses of recipients of a few thousand dollars in expenditures, all of which had been accurately itemized along with the vendor name, date, etc. Thus, one flawed aspect of each item was used to impose the maximum fine for that item, as if there had been total non-compliance. Other counts were for failure to keep various records such as bank statements, when in fact Howard had not only kept such records *but the FPPC was in possession of them.*

Had Howard failed to file any reports at all, the total fine would have been at most $12,000. The FPPC used incomplete information in his reports to generate almost 400 violations. Certainly, incomplete reporting was better than not filing reports at all. Worse than failing to credit Howard's good faith cooperation and partial disclosure, the FPPC had punished us for it, relying on Howard's partial disclosure (and later full disclosure) in order to fine us orders of magnitude more than had there been no disclosure at all followed by late form filings.

The fine is excessive and unreasonable, and therefore an unconstitutional atrocity.

California law provides two avenues to challenge constitutionality and legality of such an assessment. First, direct review via suit for writ of mandate. Second, because the FPPC regulates political activity, statutes provide that in suing to enforce penalty, the FPPC bears the burden of proving the penalty was assessed in accord with the procedures in the relevant portions of the statute; electoral statues also require the courts to exercise oversight and determine proper imposition. App. 4-5.

On January 3, 1996, before we could obtain legal representation, the FPPC sued us, seeking a money judgment for the penalty. By January 17, 1996, we were able to hire an attorney to cross-complain and seek writ of mandate. Our cross-complaint asserted, *inter alia*, that assessment of the penalty violated freedom of expression and that the amount violated Eighth and Fourteenth Amendment protections against excessive fines. App. 29.

The action languished for several years, neither side moving for trial. Our succeeding attorney attended several court hearings that the FPPC missed with impunity, due to a custom allowing government agencies a special preference to offer the excuse that they were too busy to show up. For example, the FPPC failed to appear at a status conference on March 6, 1997. Our attorney, who had already been paid our entire donated defense funds of around $50,000, told us that the court and the FPPC had forgotten about the case; advised us to do nothing; assured us that it was incumbent on the FPPC to move, that their case would be dismissed if they did not, but that we faced no such risk by waiting. In early 2000, the FPPC contacted our attorney about getting the case back on schedule. Instead of going along with that, he told the FPPC he would file to dismiss their case, which he then did, and the FPPC responded in kind. Inexplicably, our attorney

repeatedly advised the court, incorrectly, that we had disappeared and he had no way to contact us. On August 4, 2000, the Superior Court, *per* Judge Lloyd Connelly, dismissed our counterclaim for lack of prosecution, while denying a motion to dismiss the enforcement action for money judgment on the same ground. App 20-21.

After discovering that Judge Connelly was former Assemblyman Connelly, who CAC had named as a recall target, whose firm had represented Senator Roberti's PAC while he was a partner, and whose own PAC had contributed to Roberti's and Assemblyman Roos' PACs, we moved unsuccessfully to recuse him and vacate his order.

The FPPC then moved for summary judgment. In opposition, we again asserted First and Eighth Amendment claims, and the fact that the FPPC's employees had not been duly empowered to conduct hearings and assess the penalty. The Superior Court ruled that the constitutional claims were barred by dismissal of the mandate cross-complaint, and that the employees' power to hold hearings could not be challenged in an enforcement action. It entered summary judgment for the FPPC (App. 22-23), in an amount by then grown, with interest, to over $1,100,000. We appealed to the California Court of Appeals, which affirmed. App 17. The Court of Appeals dealt with the First and Eighth Amendment objections by ruling that these must be raised in a mandate action (which had, as noted above, been filed but unconstitutionally dismissed) rather than in an action to enforce, App. 14, that the assessing officer had apparent authority which likewise could not be challenged in an enforcement action, and that the requirement for the FPPC to prove its actions consistent with the statutes referred only to its following of statutory procedure other than the Constitution and the manner of appointment of its agents. The effective result of this application was that the FPPC must prove its penalties are properly imposed, except as to any issue that would keep it from winning this particular case and

prevent an unconscionable fine amounting to a sentence of lifetime impoverishment against Howard and Cicero.

Our appellate attorney sought review in the California Supreme Court, raising the 8th Amendment. App. 18. However, he submitted the petition at the last minute without our review and so without our permission failed to raise the 1st Amendment and other issues. He then failed to correct misrepresentations of our position. For example, we were characterized as not diligent for failing to attend the FPPC hearing, without mention of our inability to afford legal representation. A similar statement was made about the dismissal for lack of diligence in moving our petition for writ of mandate, when he knew that our attorney had advised us to not to move it).[2] The California Supreme Court denied review. App. 19.

REASONS FOR GRANTING THE WRIT

I. THE CALIFORNIA COURT'S DECISION DEPRIVES PETITIONERS OF A REASONABLE OPPORTUNITY TO HAVE THEIR RIGHTS HEARD AND DETERMINED.

While it is hornbook law that this Court will not consider a challenge where the lower court's determination rests upon independent State ground, this Court has recognized an exception where the lower court failed to allow Petitioners "a reasonable opportunity to have the issue as to the claimed right heard and determined by that court." *Central Union Telegraph Co. v. Edwardsville*, 269 U.S. 190, 194-95 (1925).

There is no question the California courts had the power to determine the constitutional issues. A writ of mandate had been sought, and its dismissal was based purely upon discretion. As this Court recognized,

> "[W]here a State allows questions of this sort to be raised at a late stage and be determined by its courts as a

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[2] The FPPC's missed hearings were not mentioned.

> matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner."

Williams v. Georgia, 349 U.S. 375 (1955). Here, the California courts utilized their discretionary powers to avoid resolution of the constitutional issues posed. First, they dismissed the mandate action. Second, utilizing the same discretion, they declined to dismiss the enforcement action. Finally, they held that the constitutional claims could not be raised in the enforcement action.

The California courts ruled that we had exhausted our judicial remedies. In fact, the courts discretionarily exhausted them for us. In a case similar to ours, *County of Sauk v. Trager*, 118 Wis.2d 204, 346 N.W.2d 756 (1984), the Wisconsin Supreme Court examined the exhaustion of judicial remedies doctrine, ruling that a court should permit a defendant in an enforcement proceeding who did not prevail on a writ petition to challenge an administrative decision if on balance 4 factors weigh in favor: (1) legal issues the same in the writ and the enforcement action, (2) no factual disputes, (3) agency decision suspect on its face, and (4) not permitting defense would be harsh. (*Id.* at p. 215-216, 346 N.W.2d at pp. 761-762.) Our defenses were the same as in our writ petition (violated Excessive Fines Clause; imposed in excess of jurisdiction.) We presented no factual disputes. The fine was suspect on its face as the largest the FPPC ever imposed; on entities who could not pay it; by two "Acting Executive Directors", neither of whom were properly appointed. In determining the fine's size, the FPPC considered that Howard had "blatantly spoken out in the media on [his] disregard for the laws of the FPPC", and failed to consider any mitigating factors. Not letting us present our defense was harsh,

especially since the fine is not dischargeable in bankruptcy (11 U.S.C. § 523(a)(7) [exempting fines from discharge]). The fine has the potential to ruin our lives, precluding buying a house, accumulating savings, even holding jobs. It was unduly harsh to permit the FPPC to obtain a huge judgment against us without the trial court considering the merits of our constitutional and statutory challenges. Had the state courts adopted the *Sauk v. Trager* standard, we would have been able to present a defense.

The due process clause precludes states and state courts from hiding behind and applying state law doctrines and niceties so as to impose unconscionable violations of fundamental rights. In determining federal due process in light of this monstrous fine, the court below could have used the *Sauk v. Trager* standard set by another state court of last resort, could have allowed a defense, could have and should have refused to apply doctrines mechanically and mercilessly to affirm a sentence of lifetime impoverishment.

II. THE DECISION OF THE CALIFORNIA COURTS DEPRIVES US OF OUR EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND FLIES IN THE FACE OF THIS COURT'S RULINGS.

The Eighth and Fourteenth Amendments impose a limit on civil penalties. The "excessive fine" and "cruel and unusual punishments" provisions of the former relate to "punishments," not merely "criminal proceedings." *Austin v. United States*, 509 U.S. 692 (1998); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of North America, Inc. v. Gore*, 517 U. S. 559 (1996). There is little question the million-dollar penalty imposed here was intended as "punishment" by a state agency.

The rulings below hold that we could not raise the excessive punishment issue in the judicial enforcement action, but

only in an action for mandate. As we show above, we brought such an action as a counterclaim, then Judge Connelly dismissed the counterclaim for lack of prosecution while continuing with the enforcement action, generating a result which deprived us of any reasonable opportunity to fairly present our constitutional claims.

There is a second reason why the result below offends the Eighth Amendment and deprives us of any fair chance to assert our rights. The holding below is that an Eighth Amendment defense to an administrative action may only be asserted by petition for a writ of mandate. Under California law, even when fundamental rights are at stake, the standard of review in mandate actions is limited. While the court is empowered to exercise independent judgment in such cases, the petitioner bears the burden of proof, and must overcome a "strong presumption" that the administrative decision was correct. *Fukuda v. City of Angels*, 20 Cal.4th 805, 977 P.2d 693, 85 Cal.Rptr.2d 696 (1999).

This flies in the face of this Court's decision in *Cooper Industries, Inc., supra*, that jury awards of punitive damages must be reviewed *de novo*. In *Cooper Industries, Inc.*, the plaintiff at least bore the burden of proving to an impartial jury the appropriate amount of award, before appeal was taken. Here, the decision from which judicial review was sought was imposed by an enforcing agency—indeed, due to the illegal appointment of the agency's deciding officials, by the very officials who were charged with enforcement. We were not given trial by jury, but trial in absentia by prosecutor, yet from this decision the only appeal is one in which the accusation and penalty are given strong presumption of correctness.

The courts also adopted and applied a novel version of the de facto officer doctrine, knowing that the result in this case would be unconstitutionally severe.

Should the California disclosure statute not be held unconstitutional as applied in this case, the fine should be held excessive by the reasoning in *Austin v. United States*, 509 U.S. 602 (1993) and *Alexander v. United States*, 509 U.S. 544 (1993), which held that whether state fines were excessive is a federal question under the 14th Amendment and enabling legislation thereto, and that such question when raised, as it was in this case, must be decided on its merits.

III. THE DECISION OF THE CALIFORNIA COURTS DEPRIVES PETITIONERS OF THEIR FIRST AND FOURTEENTH AMENDMENT RIGHTS

As this Court has recognized,

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.) . . . Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."

NAACP v. Alabama, 357 U.S. 449, 462 (1958).

There is no doubt *NAACP v. Alabama* is applicable to campaign contribution reporting. "Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). The *Buckley* Court declined to reach the issue, since the risk of donor harassment was "highly speculative" in that case, although the Court noted,

> "Where it exists the type of chill and harassment identified in *NAACP vs. Alabama* can be shown. We cannot assume that courts will be insensitive to similar showings when made in future cases."

424 U.S. at 74. Our case presents the context not presented in *Buckley*. CAC's cause angered followers of a powerful official. Its headquarters was burglarized; its telephone lines cut; death threats issued against its officers. Names of CAC members and donors were announced and denounced, and they contacted us with understandable fears of reprisals. (App. 24-28) The California courts' summary disposition precluded us from asserting legitimate 1st and 14th Amendment claims. Their requirement that the issue be raised in a mandate proceeding, where a strong presumption exists that the agency's actions were proper, limits fair presentation and reverses the burden of proof.

This First Amendment issue was raised in the Superior Court cross-complaint, (App. 29) and as a disputed fact on the motion for summary judgment in the enforcement action (App. 24-25), but only as a footnote in the California Court of Appeals. This Court, however, retains power to consider issues not fully raised below, where the error is plain and separate basis for jurisdiction is evident. *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980); *Vachon v. New Hampshire*, 414 U.S. 478, 479 (1974). If the Court should accept jurisdiction based upon questions I and II, *supra*, we would request that the Court also give consideration to this basis for certiorari.

Per *McConnell v. FEC*, 540 US_ (2003), the FPPC may not constitutionally regulate all political activity, but only that which may result in "corruption or the appearance of corruption". It infringes the First Amendment to apply such disclosure legislation to oppose or recall candidates. There may be corruption or its appearance in donating to or spending in close coordination with a candidate, or opposing his main challenger whereby he can be expected to benefit, or supporting legislation to redistribute the burden and benefits of taxing and spending to benefit supporters. But independent expenditure to expose corruption is inherently less susceptible to corruption or its appearance. The burden should be on regulators to show that such political activity is corruptive, or apparently so, to public choice.

Discretion was exercised in this case so as to single out for punishment at a criminal level an effort not to elect a candidate to advance the donors' cause, or adopt legislation to further donor rent-seeking, but only to remove elected officials for causes set forth in our published literature. This appears to be retaliation against dissenters and their supporters, not a way to inhibit corruption. The First Amendment was intended to protect such dissent.

The FPPC has not shown that any funds collected or spent by CAC was for a particular candidate for elected office, or for rent-seeking legislation. Failing such a showing, the act which the FPPC attempts to enforce in this case should be held unconstitutional as applied.

IV. THE DECISION OF THE CALIFORNIA COURTS DEPRIVES US OF OUR 6TH AND/OR 7TH AMENDMENT RIGHTS.

The court below erred by allowing a state agency serving as law enforcement officer, prosecutor, judge, and jury to impose in absentia a "civil" penalty of $1,100,000, while denying the most basic rights accorded criminal defendants.

Is there any outer limit to the concept of "civil" penalties before they become criminal in their harshness?

Had we been charged by a *prosecutor* with an offence carrying a $100 fine, we would have been entitled to presumption of innocence and full judicial trial.

Had we been charged with an offence bearing penalty of just one day in jail, federal law would have entitled us to presumption of innocence, full judicial trial, and an attorney paid for because we could not afford one. California law would have entitled us to jury trial. Inadequate representation by counsel, which we suffered repeatedly and caused severe defects in our case, would have been grounds for appeal.

Although it was held in *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916) that the 7th Amendment protection of trial by jury in controversies involving substantial amounts of money was not incorporated by the 14th Amendment, we ask the Court to revisit this issue, as in this case the amount is punitive and justifies Fifth Amendment protections, both as a penalty suited only to a crime is involved, and because due process in such deprivation of property at least requires a trial, not just a ruling on a motion for summary judgment.

Ours is a penalty fit for a true crime; its severity far exceeds punishments imposed for most criminal acts, even many involving victims. Describing it as a non-criminal penalty with a name that hides its essence enabled it to be imposed in circumvention of safeguards and rights honored even in minor criminal cases that result in tiny penalties.

The courts should not let the FPPC circumvent the rights of those facing a severe, crime-sized penalty, simply by letting them call it something else. Nor should the courts let agencies serving as law enforcement officer, prosecutor, judge, and jury unleash unlimited financial ruin absent the safeguards intended to ensure that it is properly visited and deserved.

With defendants facing such powers under one roof, the courts should apply a standard of due process for an agency's defendants constitutionally commensurate to the greater danger of abuse and harm than that faced by defendants in private suits. Defendants facing penalties suitable only to crimes, issued by agencies with relatively unlimited prosecutorial resources, should be afforded rights that were intended to be commensurate with such penalties and resources. Such defendants should have a right to jury trial under the 6th or 7th Amendments, to an attorney if they cannot afford one (or at least competent and ethical representation if they must pay for it), and to a presumption of innocence.

If such rights are not afforded, then a standard of due process should not be tolerated that turns rights into privileges effectively available only to the rich and powerful, which pretends grassroots dissidents facing total ruin are equal in resources to wealthy politicians, corporations and political parties facing far smaller fines, and mercilessly demands the same level of legal diligence.

Courts should not let agencies create case defects that exist solely due to denial of rights, then rely on those very defects in such a way as to deny other federal constitutional rights without judicial trial of any kind; a rigged, circular denial of rights that is effectively a constitutional Catch-22, insurmountable to few but the wealthy and powerful.

The defects in our case exist due to the denial of such rights. In that regard we hope that—if what we could afford to have in our appendix is insufficient to consider our case—this court will take notice of all court records in this case that we could not afford to place there, such as Appellant's Opening Brief and appendices, Case No. 96AS00039 Appeal from Superior Court for the County of Sacramento, *FPPC v. Californians Against Corruption, et. al.* Some of these are available on www.cacdefensefund.org/doc_link.html

CONCLUSION

As Americans, we believed that even dissident grassroots neophytes who could not afford effective legal representation could peaceably assemble to express political opinions and participate in the democratic process without being singled out for destruction and in many ways disenfranchised by a government agency. We were wrong.[3]

We did not waive our 8th Amendment rights or any others. At every level of the California courts, they were discretionarily waived for us in a way that affirmed a sentence of lifetime impoverishment, without trial, on questionable state law procedural grounds, in clear violation of state code requiring the courts to exercise oversight. Should there not be a higher standard of due process when the result of "waiving our rights" is so extreme?

Even if we had affirmatively waived our rights, would that waive FPPC officers and state judges from their duty to honor their sworn oath not to apply laws and doctrines so as inflict unconscionable violations of those rights? If we could be barred from asserting our right not to be tortured, would that give state officers and judges the right to torture us? Would they not still bound by their own affirmative oaths to defend the 8th Amendment?

The courts below should have imposed exceptions not just as to state law, but because they were constitutionally compelled to do so in this case.

We may be dissidents; we may have made mistakes; some of our political opinions may have angered powerful incumbents and the agency we believe protects them. But is that reason to destroy our lives or deem us expendable?

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[3] Due to the fine, CAC is defunct, and its leadership no longer participates in the democratic process.

We love this country deeply, and we see this petition as a heartfelt plea to restore our citizenship. Is there no room in our great nation for two grassroots political dissidents who meant no harm and basically did none, however irritating our opinions may be?

We respectfully plead that the Court grant writ of certiorari to review the decision of the California Supreme Court, and that the judgment against us be dismissed or remanded to the California Supreme Court for decision consistent with our constitutional rights.

Respectfully submitted,

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Petitioners

APPENDIX

APPENDIX

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

C038246
(Super. Ct. No. 96AS00039)

FAIR POLITICAL PRACTICES COMMISSION,
Plaintiff and Respondent,

v.

CALIFORNIANS AGAINST CORRUPTION *et al.*,
Defendants and Appellants.

In 1995, Ravi Mehta, chairman of the Fair Political Practices Commission (FPPC or Commission), signed a document delegating some of the Commission's functions to employees of the FPPC. Before the FPPC ratified the delegation, the employees held proceedings against an organization and two of its treasurers for violations of the Political Reform Act.[1] When the organization and treasurers failed to respond to notices from the FPPC employees, a default decision was entered against the organization and treasurers including a fine of $808,000.

The FPPC initiated this action to obtain a civil judgment against the organization and its treasurers. The trial court entered judgment in the FPPC's favor for almost $1.1 million, including interest. On appeal, defendants assert (1) the FPPC was not entitled to judgment pursuant to Government Code

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[1] The official name of the act is the Political Reform Act of 1974. (Gov. Code, § 81000.) We will use, however, the shorter version of the act's name.

section 91013.5 because it did not follow the procedures set forth in the Political Reform Act and implementing regulations, (2) the FPPC failed to consider mitigating evidence, and (3) the penalty was unconstitutionally excessive. We affirm.

BACKGROUND

Californians Against Corruption (CAC) was organized on March 26, 1992, with Carl Russell Howard as treasurer. Stephen J. Cicero was later the treasurer from July 1993 to April 1994.[2] CAC used money it raised primarily to fund a campaign to recall Senator David Roberti. From January 1992 to June 1994, CAC received approximately $141,559 in contributions and expended approximately $103,091.

Ravi Mehta became chairman of the FPPC on January 14, 1995. Several days later, he signed a document entitled "Delegation of Authority." Citing provisions of the Government Code and regulations concerning the FPPC, he purported to "delegate the statutory, regulatory, and administrative duties and authority of the Executive Director" to Robert Tribe, Jeevan Ahuja, and Steven G. Churchwell. Specifically, the document stated that Ahuja was to have "the authority to conduct probable cause proceedings, including, but not limited to, making a determination as to the existence of probable cause . . . ."

In June 1995, Jeevan Ahuja presided at a hearing to determine whether probable cause supported proceedings against defendants for violations of the Political Reform Act. Although they were given notice of the hearing, defendants did not attend and did not send counsel. On June 29, 1995, Ahuja signed an order finding "probable cause to believe that [defendants] violated provisions of the Political Reform Act . . . ."

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[2] At times hereafter, CAC, Howard, and Cicero are referred to, collectively, as defendants.

On August 8, 1995, Robert Tribe filed an accusation against defendants asserting 404 violations of the Political Reform Act and seeking a penalty of $2,000 for each violation. The following chart shows the allegations against defendants.

Number	Alleged Violation
1-2	Failure to file a timely semi-annual statement
3	Failure to file a late contribution report
4-96	Failure to report occupation of a contributor
97-187	Failure to report employer of a contributor
188-250	Failure to itemize a contribution
251-355	Failure to report street address of contributor
356	Contributions for six-month period understated by $2,024
357	Contributions for a 30-month period understated by $10,408
358-392	Failure to report address of contributor
393-396	Failure to file allocation pages showing contributions to others
397	Failure to notify major contributors
398	Failure to maintain records of expenditures
399	Failure to retain bank statements
400	Failure to maintain records of receipts
401	Failure to maintain records of contributors' occupations and employers
402	Failure to maintain records of non-monetary contributions
403	Failure to maintain records of dates contributions were received
404	Failure to maintain records of mass mailings

The FPPC sent the accusation to defendants. Because defendants did not respond with a notice of defense within 15 days, Tribe, on October 20, 1995, signed a default decision and order finding defendants violated the Political Reform Act as alleged in the accusation and imposing a fine of $808,000. Ravi Mehta signed the default decision and order

on November 2, 1995. Defendants filed a petition for writ of mandate, but the petition was later dismissed for lack of prosecution.

At a meeting of the Commission on April 4, 1996, it was noted that Mehta signed the January 20, 1995 delegation document. The notes of the Commission hearing continue: "Commissioner Rushford recommended the appointment of Mr. Churchwell and Mr. Tribe as Acting Co-Executive Directors with divided responsibilities. Mr. Churchwell will handle the probable cause hearings and Mr. Tribe will do the rest of the Executive Director responsibilities. In addition, this motion will ratify Chairman Mehta's assignment of those duties to them from January 20, 1995, when the delegation was first made. . . . The motion was carried."

On January 3, 1996, the FPPC filed an action against defendants to obtain a civil judgment in the amount of the fine, as allowed by Government Code section 91013.5. Defendants answered the complaint, and the FPPC moved for summary judgment. The trial court granted the FPPC's motion and later entered judgment against defendants for $808,000, plus $287,513.33 in interest.[3]

DISCUSSION

I

Compliance with Required Procedures

After the FPPC finds that an organization or person has violated the Political Reform Act and imposes a fine, it may obtain a civil judgment requiring payment of the fine. In a proceeding to obtain a civil judgment, however, the FPPC

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[3] On April 17, 2002, the FPPC filed a request for judicial notice of Senate and Assembly committee reports concerning the enactment of the bill that included Government Code section 91013.5. The request is appropriate pursuant to Evidence Code section 452, subdivision (c), and is therefore granted.

bears the burden of establishing several prerequisites, including a showing that the fine was imposed following the procedures set forth in the Political Reform Act and implementing regulations. (Gov. Code, § 91013.5.)[4] Defendants argue that the FPPC was not entitled to judgment in this matter because it did not establish the fine was imposed following the proper procedures when it delegated Commission functions to Ahuja and Tribe. We conclude defendants cannot make this argument here because they did not challenge the authority of FPPC officials in earlier proceedings.

A. *Political Reform Act*

The Political Reform Act was adopted by initiative in 1974. It established the FPPC and charged it with primary responsibility for the impartial, effective administration and

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[4] Former Government Code section 91013.5 stated:

"In addition to any other available remedies, the commission or the filing officer may bring a civil action and obtain a judgment in small claims, municipal, or superior court, depending on the jurisdictional amount, for the purpose of collecting any unpaid monetary penalties, fees, or civil penalties imposed pursuant to this title. The venue for this action shall be in the county where the monetary penalties, fees, or civil penalties were imposed by the commission or the filing officer. In order to obtain a judgment in a proceeding under this section, the commission or filing officer shall show, following the procedures and rules of evidence as applied in ordinary civil actions, all of the following:

"(a) That the monetary penalties, fees, or civil penalties *were imposed following the procedures set forth in this title and implementing regulations.*

"(b) That the defendant or defendants in the action were notified, by actual or constructive notice, of the imposition of the monetary penalties, fees, or civil penalties.

"(c) That a demand for payment has been made by the commission or the filing officer and full payment has not been received." (Stats. 1984, ch. 670, § 5; italics added.)

implementation of the Political Reform Act. (*Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd.* (1978) 82 Cal.App.3d 433, 436.)

The FPPC appoints an executive director who must act in accordance with applicable laws, policies, and regulations. (Gov. Code, § 83107.)[5] "The Commission may delegate authority to the chairman or the executive director to act in the name of the Commission between meetings of the Commission." (Gov. Code, § 83108.)

The first phase of FPPC proceedings after investigation of an alleged violator of the Political Reform Act is to determine whether there is probable cause to believe a violation has occurred. The Government Code provides for a determination of probable cause by the Commission. (Gov. Code, § 83116.) By regulation, however, this determination has been delegated to the executive director: "The Executive Director may find there is probable cause to believe a violation has occurred if the evidence is sufficient to lead a person of ordinary caution and prudence to believe or entertain a strong suspicion that a proposed respondent committed or caused a violation. A finding of probable cause by the Executive Director does not constitute a finding that a violation has actually occurred." (Cal. Code Regs., tit. 2, § 18361, subd. (d)(4).) A finding of probable cause allows the Commission to hold a hearing concerning whether a violation has occurred and, if it so finds, impose a fine. (Gov. Code, § 83116.)

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[5] "The Commission shall appoint an executive director who shall act in accordance with Commission policies and regulations and with applicable law. The Commission shall appoint and discharge officers, counsel and employees, consistent with applicable civil service laws, and shall fix the compensation of employees and prescribe their duties." (Gov. Code, § 83107.)

Acting pursuant to Mehta's delegation of authority to act as an executive director, Jeevan Ahuja determined probable cause supported further proceedings against defendants and Robert Tribe filed the accusation and signed the default decision and order. Defendants assert these actions were taken without proper authority because Mehta's delegation was ineffectual. We conclude, however, that even assuming Mehta's delegation was ineffectual, defendants' challenge of the authority of Ahuja and Tribe is precluded by the de facto officer doctrine.

B. *De Facto Officer Doctrine*

"'Persons claiming to be public officers while in possession of an office, ostensibly exercising their functions lawfully and with the acquiescence of the public, are *de facto* officers. . . . The lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.' [Citations.]" (*In re Redevelopment Plan for Bunker Hill* (1964) 61 Cal.2d 21, 42.) "[T]he right of a de facto officer to an office cannot be collaterally attacked. [Citations.] A right to hold office may not be collaterally attacked by a challenge to the official acts performed by the person holding such office. [Citation.]" (*Ibid.*)

Here, the FPPC officials, acting pursuant to Mehta's delegation, acted as public officials, exercising their functions with public acquiescence. Their actions were within the scope or apparent authority of the offices they purported to hold. Therefore, their actions were valid and binding in the face of collateral attack.

Defendants, nevertheless, make several arguments against application of the de facto officer doctrine here: First, they are attacking the officials' authority directly, not collaterally.

Second, the de facto officer doctrine does not apply because of an exception for appointment requirements enacted to protect people subject to the FPPC's authority. Third, collateral estoppel bars the FPPC from asserting the de facto officer doctrine. Fourth, the de facto officer doctrine is bad law. And fifth, Ahuja and Tribe were not de facto officers.

1. *Collateral Attack*

Defendants assert this is a direct, not collateral, attack on the authority of Ahuja and Tribe. They base this assertion on the language in Government Code section 91013.5 requiring the FPPC, as an element of its enforcement action, to establish "[t]hat the monetary penalties, fees, or civil penalties were imposed following the procedures set forth in this title [the Political Reform Act] and implementing regulations." (Gov. Code, § 91013.5, subd. (a).) Since the statutes concerning delegation of authority within the FPPC are contained in the Political Reform Act, defendants argue, the failure to delegate authority according to those statutes and their implementing regulations is a failure to follow the procedures set forth in the Political Reform Act. This failure prevents the FPPC from establishing an element of its cause of action against defendants under Government Code section 91013.5, subdivision (a). Thus, according to defendants, the qualification of Ahuja and Tribe to act is directly, not collaterally, at issue.

This argument misconstrues Government Code section 91013.5, subdivision (a), which refers only to procedures for *imposing* the fine, not qualifications of FPPC employees to act. By using the phrase "imposed following the procedures," the Legislature evinced an intent to protect a person or organization subject to an FPPC fine from civil enforcement of that fine if the FPPC failed to follow the procedures for imposing the fine, as required by the Political Reform Act. This has to do with the procedural rights afforded to the person or organization, not to the authority of the FPPC to act

through its employees. Thus, Government Code section 91013.5, subdivision (a), does not implicate the authority of the officiating officer. Nothing in the statute supports the conclusion the Legislature intended to allow someone such as defendants here to ignore proceedings of the FPPC and later defend a civil action to enforce the imposed fine based on an attack on the authority of the officiating officer.

Accordingly, Government Code section 91013.5 does not provide for a direct attack on the authority of the FPPC's officiating officer. Defendants' attack is collateral.

2. *Protection Exception*

Defendants assert there is an exception to the de facto officer doctrine which occurs when the government officer's appointment requirements were imposed to protect the person subject to the officer's authority. He bases this assertion of an exception, primarily, on a law review note and an opinion of the Illinois Supreme Court. (See Note, The De Facto Officer Doctrine: The Case for Continued Application (1985) 85 Colum.L.Rev. 1121, 1135 (*De Facto Officer Doctrine*); *Daniels v. Industrial Com'n* (Ill. 2002) 775 N.E.2d 936 (*Daniels*).) We need not decide whether the law review note and the Illinois case reflect California law because, even assuming they do, they do not provide for an exception to the de facto officer doctrine under the facts of this case.

The major thesis of the law review note is that the de facto officer doctrine should be retained, even though its continued existence has been threatened by a federal court decision. (*De Facto Officer Doctrine, supra,* 85 Colum.L.Rev. at p. 1121; see also *Andrade v. Lauer* (D.C. Cir. 1984) 729 F.2d 1475 [questioning validity of de facto officer doctrine].) Citing several draft evasion cases in which courts allowed as a defense the improper selection of members of local draft boards, the note proposes an exception to the de facto officer doctrine "when a qualification for a specific office aims to

protect the individuals subject to that official's authority." (*De Facto Officer Doctrine, supra,* 85 Colum.L.Rev. at p. 1135.) The note concludes that a court "should discern the policies embodied in the particular requisite to office and determine whether they are designed to protect the interests of individuals appearing before such officers or to protect the administration of government." (*Id.* at p. 1138.)

Attempting to apply this exception described in the law review note to their case, defendants observe that, by statute, not more than three of the five FPPC members may be from the same political party and that its members are appointed by different elected officials. (See Gov. Code, §§ 83100, 83101, 83102.) They also note that the FPPC, acting as a body, appoints the executive director and other officers. (See Gov. Code, 83107.) They conclude that these statutes establish that the appointment requirements at issue here were imposed to protect individuals.

We disagree. The facts of this case do not imperil interests personal to defendants that are protected by the Political Reform Act. Although we assume for the purpose of argument that the delegation from the chairman (Mehta) to those acting in the functions of executive director (Ahuja and Tribe) was improper because the FPPC had not given the chairman authority to act on its behalf, it could have done so under Government Code section 83108. Furthermore, the FPPC ratified Mehta's action later. This is not a case in which Mehta could not have been authorized to delegate authority; instead, the proper authorization did not come until after he made the delegation. (Contra *Daniels, supra,* 775 N.E.2d at pp. 938-939, in which arbitrators were appointed by commission chairman to fill positions that could only be filled by gubernatorial appointment.) We therefore conclude the specific failure to follow the statutory scheme to delegate duties of the executive director did not implicate the statutory provisions meant to protect defendants' individual interests,

as discussed in the law review note. This case does not fall within the law review note's exception to the de facto officer doctrine.

In *Daniels*, the Illinois Supreme Court held that a worker's compensation claimant, on direct review of a compensation award, could challenge the legal status of the commissioners who adjudicated his claim. (775 N.E.2d at p. 940.) This is readily distinguished from the present case because, here, we consider a collateral attack. Even if, under California law, defendants could make a direct attack on authority of Ahuja and Tribe consistent with *Daniels*, they did not. Therefore, *Daniels* is unhelpful to defendants.

3. *Collateral Estoppel*

The issue of improper delegation by Mehta appears to have been litigated and resolved against the FPPC in another case in the trial court. (*Horcher v. Fair Political Practices Commission* (Super. Ct. Sac. County, 1996, No. 96CS00804).) Defendants argue that collateral estoppel precludes the FPPC from arguing the de facto officer doctrine in this case because, even though the de facto officer doctrine was not raised in the *Horcher* case, it could have been. In support of this assertion, defendants cite *Warga v. Cooper* (1996) 44 Cal.App.4th 371, a case in which the court applied the doctrine of res judicata, not collateral estoppel, to an issue in an action involving the same parties as the prior proceeding. (*Id.* at pp. 377-378.) Defendants were not involved in the prior proceeding here; therefore, only the doctrine of collateral estoppel may be applied, if appropriate. We find it is not.

The elements of the collateral estoppel doctrine are well established. "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been

necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 849.) It is undisputed that the de facto officer doctrine was not litigated in *Horcher*. Accordingly, neither of the first two elements can be established. Collateral estoppel does not preclude the FPPC from asserting the de facto officer doctrine in this proceeding.

4. *Validity of De Facto Officer Doctrine*

Recognizing that the California Supreme Court has held that California courts follow the de facto officer doctrine (see, e.g., *In re Redevelopment Plan for Bunker Hill, supra,* 61 Cal.2d 21), defendants, to preserve the issue for possible later review, assert the de facto officer doctrine is bad law and should not be followed. We are bound by the Supreme Court's holding. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

5. *Ahuja and Tribe as De Facto Officers*

Defendants assert this is not a case in which the de facto officer doctrine is applicable because Mehta did not appoint Ahuja and Tribe as acting executive directors; instead, he delegated to them the duties of an executive director. This is a distinction without a difference. Ahuja and Tribe purported to perform the functions of an executive director. They held themselves out as properly authorized to so perform. The fact that the source of their purported authority was by delegation rather than appointment makes no difference because, by virtue of their performance, they purported to possess the requisite office necessary for those functions. They were not interlopers sitting on a street corner purporting to mete out justice. They were FPPC officials recognized to be performing within the apparent scope and by the apparent

authority of the office of executive director. (See *In re Redevelopment Plan for Bunker Hill, supra,* 61 Cal.2d at p. 42.)

We therefore find that the de facto officer doctrine precludes defendants' collateral attack on the authority of Ahuja and Tribe to officiate in FPPC proceedings against them.[6]

II

Consideration of Mitigating Circumstances

Defendants also assert the FPPC failed to follow the procedures set forth in the Political Reform Act and implementing regulations by failing to consider mitigating evidence when imposing the fine. We reject this assertion because it is made for the first time on appeal.

An implementing regulation of the Political Reform Act required the FPPC to include mitigating information known to the staff in the probable cause report: "If the Chief of the Enforcement Division decides that probable cause proceedings should be commenced . . . , he or she shall direct the Enforcement staff to prepare a written report, hereafter referred to as 'the probable cause report.' The probable cause report shall contain a summary of the law and evidence gathered in connection with the investigation, including any exculpatory and mitigating information of which the staff has knowledge and any other relevant material and arguments." (Cal. Code Regs., tit. 2, § 18361(d)(1).)

Attached as an exhibit to defendants' opposition to the FPPC's motion for summary judgment in this action is a letter written by Howard to an FPPC investigator in June 1994. In

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[6] Given our conclusion that defendants, because of the de facto officer doctrine, cannot raise the issue of whether Ahuja and Tribe had the proper authority to act, we need not consider the FPPC's additional arguments that defendants were guilty of laches and failed to exhaust their administrative remedies.

the letter, Howard stated: "[T]he reason why we withheld donors' full addresses (only providing name, city, and state) is that some of our donors are engaged in civil disobedience over the Roos-Roberti [assault weapon] ban and thus we don't feel comfortable releasing their home street addresses." In the probable cause report prepared in May 1995, FPPC staff wrote that there were no mitigating circumstances.

Defendants assert the failure of FPPC staff to include defendants' asserted reason for failing to include some information in reporting to the FPPC contravened the regulation requiring inclusion of mitigating information. This assertion, however, is made for the first time on appeal. Since defendants provide no good reason for failing to make this assertion in the trial court, we will not consider it here. (See *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846 [issues raised for first time on appeal are waived].)

III

Constitutionality of Fine

Defendants assert the judgment in favor of the FPPC was improper because the fine was constitutionally excessive. Since the constitutionality of the fine is not an element the FPPC must prove in an action pursuant to Government Code section 91013.5, we must determine whether defendant may raise the constitutionality of the fine at this late date. We conclude this issue cannot be raised in this statutory action.

When an agency takes quasi-judicial action that may be challenged judicially by way of mandamus, the action is presumptively valid until shown to be otherwise in the mandate action. (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484-485, fn. 9.) "[U]nless a party to a quasi-judicial proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions. . . . Exhaustion of judicial remedies . . . is

necessary to avoid giving binding 'effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive judicial remedy for reviewing administrative action.' [Citation.]" (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 69-70, fn. and italics omitted.)

While the holding in *Johnson* would appear to bar raising the constitutionality of the fine in this action after defendants failed to assert that issue in their mandate action, they assert they can do so here because it is a legal issue that can be resolved on the undisputed facts. Their reading of the exhaustion of judicial remedies doctrine is too narrow. The cases cited approvingly in *Johnson* show that both the factual and legal conclusions of an agency are binding in later litigation if they are not challenged by way of mandamus. (See *Johnson v. City of Loma Linda, supra*, 24 Cal.4th at pp. 70-71, citing *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637 [failure to challenge condition of building permit by administrative mandate precludes 42 U.S.C. § 1983 federal civil rights action]; *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235 [employee's failure to challenge city civil service commission finding employee was properly demoted bars factually inconsistent claims]; *City of Fresno v. Superior Court* (1987) 188 Cal.App.3d 1484 [employee's dismissal of administrative mandate action with judgment in favor of city bars action for damages].)

For example, in *Briggs v. City of Rolling Hills Estates, supra,* the plaintiffs built a combination patio and deck without a permit. As a condition for approval of other additions to the home, the city required the plaintiffs to remove the patio/deck, which it determined was in violation of a privacy ordinance. The plaintiffs did not seek review of the city's decision by way of mandamus; instead, they filed an action alleging violation of their civil rights, seeking an

injunction against enforcement of the ordinance and enforcement of the condition itself. The trial court granted the city summary judgment. (40 Cal.App.4th at pp. 641-642.)

On appeal, the *Briggs* court determined the privacy ordinance was not unconstitutionally vague on its face and therefore denied the plaintiffs their requested injunction concerning enforcement of the statute. (40 Cal.App.4th at p. 643.) As for the requested injunction concerning enforcement of the condition, the appellate court found the plaintiffs could not attack the ordinance, as applied, because they did not seek mandamus relief. The court noted that, if the condition was improperly imposed, it could have been vacated in a mandate action. (*Id.* at p. 645.)

Defendants' assertion of the unconstitutionality of the award as a defense in this action is analogous to the *Briggs* plaintiffs' assertion that the condition was unenforceable. Whether the condition in *Briggs* was properly imposed was a legal conclusion, just as, here, whether the fine was unconstitutionally excessive. Accordingly, defendants' assertion that the exhaustion of remedies doctrine applies only to factual findings is incorrect. They are precluded, in this action, from arguing the fine was unconstitutionally excessive because they could have challenged the fine as unconstitutionally excessive in a mandate action.

Defendants cite a Wisconsin case for the proposition that the exhaustion of judicial remedies doctrine should not be applied under certain circumstances, even if the party failed to exhaust judicial remedies. In *Sauk County v. Trager* (Wis. 1984) 346 N.W.2d 756, the court stated the exhaustion of remedies doctrine, as followed in California: "The decision of an administrative agency is legally binding although subject to review and the aggrieved party should comply with the agency decision or initiate a challenge promptly and in accordance with the applicable statutes. A party who wants judicial review of an agency decision should carry the burden

of initiating a petition for review rather than defying the agency and awaiting an enforcement action." (*Id.* at pp. 760-761.) The court went on to say, however, that application of the exhaustion of judicial remedies doctrine is discretionary. It thereafter concluded that, under the circumstances of that case, the court would not apply the exhaustion of remedies doctrine. (*Id.* at p. 762.)

Contrary to the Wisconsin Supreme Court holding, the California Supreme Court's development of the exhaustion of remedies doctrine does not provide for discretionary decisions of lower courts concerning whether to apply the doctrine. (See *Johnson v. City of Loma Linda, supra,* 24 Cal.4th at pp. 69-70.) Since we must apply California precedent, we reject defendants' assertion that we should exercise discretion and decline to apply the exhaustion of remedies doctrine.

DISPOSITION

The judgment is affirmed. The FPPC's request for judicial notice is granted. Each party shall bear its own costs on appeal.

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

FAIR POLITICAL PRACTICES COMMISSION,
Plaintiff and Respondent,

vs.

CALIFORNIANS AGAINST CORRUPTION, CARL RUSSELL HOWARD, treasurer, and STEPHEN J. CICERO, treasurer,
Defendants and Appellants.

PETITION FOR REVIEW

[Excerpt: p. 12] 3. The FPPC had imposed this $808,000 penalty on a defunct grass roots political organization and two individuals, none of whom can pay this penalty, for relatively minor reporting and recordkeeping violations. This is the largest fine the FPPC has ever imposed. (AA 450.) The FPPC imposed this fine without considering the parties' wealth, income, or ability to pay, ignored mitigating evidence, and apparently was influenced by the fact that the parties failed to participate in the proceedings. The fine is punitive, not compensatory. It is disproportionate to fines imposed on others and to fines that could have been imposed on Howard and Cicero for more egregious violations. As such, this fine is excessive and unreasonable and violates the Due Process Clause of both the federal and state constitution, the Excessive Fine Clause of both the federal and state constitutions, and the Judicial Powers Clause of the California constitution. (See generally AOB 30-42.)

IN THE SUPREME COURT OF CALIFORNIA

[Filed Sep. 10, 2003]

FAIR POLITICAL PRACTICES COMMISSION,
Plaintiff and Respondent,

v.

CALIFORNIANS AGAINST CORRUPTION,
Defendant and Appellant.

En banc

Petition for Review is DENIED.

THE MUNICIPAL AND SUPERIOR COURT
COUNTY OF SACRAMENTO

No: 96AS00039

FAIR POLITICAL PRACTICES COMMISSION,
a state agency,
Plaintiff/Cross-Defendant/Respondent,

v.

CALIFORNIANS AGAINST CORRUPTION, CARL RUSSELL HOWARD, treasurer, and STEPHEN J. CICERO, treasurer,
Defendants/Cross-Complainants/Petitioners.

ORDER GRANTING CROSS-DEFENDANT/ RESPONDENT'S MOTION TO DISMISS CROSS-COMPLAINT/PETITION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS COMPLAINT

Plaintiff/Cross-Defendant/Respondent, the Fair Political Practices Commission's (hereinafter, plaintiff), motion to dismiss the cross-complaint/petition for writ of mandate of defendants/cross-complainants/petitioners, Califbmians Against Corruption, Carl Russell Howard, treasurer, and Stephen J. Cicero, treasurer (hereinafter, collectively, defendants), was regularly heard at the above date and time. Also heard was defendants' motion to dismiss plaintiffs complaint for want of prosecution. . . .

IT IS ORDERED that defendants' petition for cross-complaint/write of Mandate is dismissed for failure to prosecute pursuant to Code of Civil Procedure section 583.410 and California Rules of Court, rules 372 and 373. It is well established that a section 583.410 dismissal motion is applicable to mandate petitions. Defendants have shown no diligence in the prosecution of their petition during the four

years since its amendment in 1996. Defendants have also shown no reasonable excuse for this lack of diligence in the prosecution of their petition for four years.

IT IS FURTHER ORDERED that defendants' motion to dismiss plaintiff's Complaint for monetary penalties is denied. Plaintiff's delay in prosecuting its complaint is excused by the parties' and Court's clear intent and understanding that defendants' petition for writ of mandate would be heard prior to the complaint and defendants' failure to prosecute their petition excuses plaintiff's delay in prosecuting its complaint. The matter is referred back to the ACT program for further proceedings.

Dated: AUG 4 2000

Honorable Lloyd G. Connelly
Sacramento Superior Court Judge

THE MUNICIPAL AND SUPERIOR COURT
OF THE STATE OF CALIFORNIA

No: 96AS00039

FAIR POLITICAL PRACTICES COMMISSION,
a state agency,
Plaintiff,

v.

CALIFORNIANS AGAINST CORRUPTION, CARL RUSSELL HOWARD, treasurer, and STEPHEN J. CICERO, treasurer,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT

The motion of the FAIR POLITICAL PRACTICES COMMISSION (Plaintiff) for summary judgment came on regularly for hearing before this court in Department No. 53, Honorable Charles C. Kobayashi, Judge Presiding, and Amy Bisson Holloway and Michelle L. Bigelow appeared as attorney for Plaintiff and John W. Howard appeared as attorney for CALIFORNIANS AGAINST CORRUPTION, CARL RUSSELL HOWARD and STEPHEN J. CICERO (Defendants).

After full consideration of the evidence, and the separate statements of each party, and the authorities submitted by counsel the court issued a tentative ruling granting Plaintiffs motion. Oral argument was requested. The court, after additionally considering counsels' argument, affirms its tentative ruling, finding that there is no triable issue of material fact in this action and that the moving party is entitled to summary judgment as a matter of law for the following reasons:

Although an administrative agency may not have the power to adjudicate a constitutional issue, Defendants were required to present all arguments before the agency so that the latter would be apprised of all the issues and take such steps as needed to rectify any erroneous decisions it may have rendered. Even if Defendants were not required to present their constitutional arguments to the agency, they certainly were required to do so by way of a writ of mandate challenging the administrative decision. Here the Defendants either failed to pursue such a remedy after having filed a petition for a writ of mandate or the court dismissed it. In any event it is too late for the Defendants to raise these constitutional issues for the first time in this case, which is a proceeding to enforce the fines rendered by the agency.

IT IS THEREFORE ORDERED that the said motion for summary judgment is GRANTED and that judgment shall be entered forthwith in favor of Plaintiff FAIR POLITICAL PRACTICES COMMISSION and against Defendants CALIFORNIANS AGAINST CORRUPTION, CARL RUSSELL HOWARD, and STEPHEN J. CICERO, jointly and severally.

Dated: MAR_12001Jg

Honorable Charles C. Kobayashi
Superior Court Judge, Sacramento County

DECLARATION OF EARLE L. STEPHEN

I, Earle L. Stephen, declare:

1. The facts set forth herein are personally known to me and I have first-hand knowledge of them. If called as a witness, I could and would competently testify thereto under oath.

2. I was titular president of the Citizens Against Corruption ("CAC") during the period of 1992 to 1994. During this time CAC was involved in the recall effort against former Senator David Roberti.

3. Both before and after the recall was qualified, several of us, including myself, received death threats and other harassing telephone calls. The office out of which CAC operated was burglarized and its telephone lines cut.

Executed at Buena Park, California, this 27th day of December 2000.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Earle L. Stephen
EARLE L. STEPHEN

DECLARATION OF WILLIAM DOMINGUEZ

I, William Dominguez, declare:

1. The facts set forth herein are personally known to me and I have first hand knowledge of them. If called as a witness, I could and would competently testify thereto under oath.

2. I was a supporter of the Citizens Against Corruption ("CAC") during the period of time of the recall effort against former Senator David Roberti by various grass-roots groups. I was also the Chairman of the Coalition to Restore Government Integrity, the umbrella grass-root group for the Roberti recall campaign.

3. The Los Angeles media took a hostile stance to the recall effort and mislabeled those in the effort as extremists, thugs, radical gun activists and the like. During the campaign, the names and occupations of contributors and supporters of the recall effort appeared in print and on the radio. People who had contributed to the effort contacted me and said they were afraid of losing their jobs because of the adverse publicity. They asked how the media had obtained this information and I told them from campaign disclosure filings. Thereafter, many people refused further contributions or only made contributions below the amount that required their identities to be reported. This placed a chill on fundraising efforts.

4. In the middle of the recall effort, my home was broken into and twenty-two guns from my gun collection were stolen. None of my guns were ever subsequently identified as having been used in a crime, pawned, sold or otherwise recovered.

Executed at California, this day of December 2000.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ William Dominguez
WILLIAM DOMINGUEZ

DECLARATION OF CARL RUSSELL HOWARD

I, Carl Russell Howard, declare:

. . . . .

4. In January of 1994, during the Roberti recall campaign, the CAC headquarters were broken into and its telephone lines were cut. In early 1994 I began receiving anonymous threats over the telephone at work, including two death threats. As treasurer of CAC, I also received Neo-Nazi propaganda back in the mail in CAC fundraising envelopes from angry recipients. The CAC did not send out this Neo-Nazi propaganda, but it would so appear to the recipient This indicated to me a tampering with the CAC mail and mailing list.

5. Because of the harassment and threats which I and others received, and the real likelihood of threats and retaliation against CAC donors and vendors, I omitted *some* reporting information on reports which I filed with the Political Practices Commission ("FFPC"). The omitted information included home addresses of donors and information about employers of donors. I was concerned that because this Information was available to the public, and because donors had been identified in the press, that by disclosing information about home addresses and employers of the donors, it would expose these donors to threats, intimidation and/or retaliation on the job.

6. The CAC was the subject of an FPPC audit following the Roberti recall election. In the course of this audit I was contacted by Mr. Bill Motmans, an investigator from the FPPC. I cooperated in this audit including authorization for the FPPC to obtain duplicate CAC bank statements. I personally met with Bill Motmans to cooperate with him in this audit. I wrote at least two letters to Mr. Motmans. Attached hereto as

Exhibit 5 is the true and correct copy of my letter of June 15 1994, to Bill Motmans wherein I referenced my June 10, 1994, telephone call with him. With aspect to any failure to disclose the home addresses of our donors, I advised Mr. Motmans at the bottom of page 1 of Exhibit 5 that I did not feel comfortable releasing the names of our donors because the (Los Angeles) Daily News had had published the names of several CAC donors in "an apparent attempt to embarrass, harass, and paint them as extremists." I then offered Mr. Motmans an opportunity to review all of the checks from these donors.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

No.: 96 AS 00039

FAIR POLITICAL PRACTICES COMMISSION,
a state agency,

Plaintiff,

v.

CALIFORNIANS AGAINST CORRUPTION, CARL RUSSELL HOWARD, treasurer, and STEPHEN J. CICERO, treasurer,

Defendants.

AMENDED CROSS COMPLAINT AND AMENDED PETITION FOR WRIT OF MANDATE

. . . .

9. The fine imposed by the FPPC in the Default Decision and order referred to above was . . . (c) unconstitutionally excessive, in that the fine greatly exceeds the fine that may or could be imposed under the Act, greatly exceeds fines levied against others for similar alleged violations of the Act, unconstitutionally impairs a fundamental right to political speech and association guaranteed by State and Federal constitutions and violates Cross-Complainants/Petitioners' rights to due process of law.